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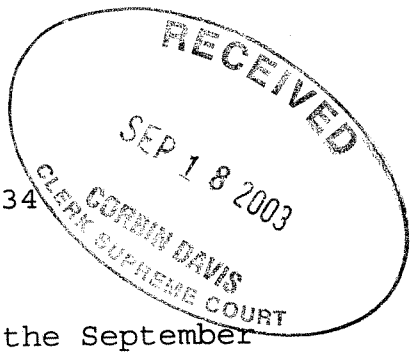
September 15, 2003

Clerk of the Court
MICHIGAN SUPREME COURT
Attention: Mr. Corbin Davis
925 W. Ottawa, 4th Floor
Lansing, MI 48915



RE: Comment Concerning Amended Rule Proposal 2002-34

Dear Mr. Davis:

I write to request an opportunity to speak on the September 25, 2003 Agenda of the Supreme Court administrative proceedings so as to express my views concerning the Docket Reduction Proposal embraced by the Rule Change to MCR 7.212, pending before this Court on consideration under Proposal 2002-34.

Please accept this memorandum in support of that request.

I have practiced appellate law exclusively for the past thirty-three (33) years. I have had the pleasure of practicing in several other state appellate courts, including Michigan as my home state, and in many federal circuits, including the Sixth Circuit, the Court of Appeals for the District of Columbia, the Fourth Circuit, the Third Circuit, the Fifth Circuit and the Tenth Circuit. I bring this list to your attention not to attempt to impress anyone, but to presage a breadth of experience on Briefing Schedules in other jurisdictions. That experience makes me yearn to keep the Michigan system just as it is, because, above all else, in my opinion, the system isn't broken here so there isn't any reason to fix it, to use street parlance.

The flexible Briefing schedule existent in Michigan compares very favorably with these other jurisdictions in which I have had experience, as Michigan allows the appellate practitioner here to adjust his or her docket and schedule to the complexities of the case, along with the pressures of coordinating the remainder of his or her docket. Some other Appellate Courts apply the one-size-fits-all-mechanistic approach brutally, as if that Court's case is the only case at issue for

the lawyer. I believe that is why the Michigan Appellate Bar has reacted so negatively to the Docket Reduction Proposal.

The Rule Change would shorten the present briefing schedule from a fluid fifty-six (56) days [plus up to another fifty-six (56) days] to a hard-and-fast forty-two (42) days, and virtually no more. This would make the otherwise presently available Extensions of Time pragmatically extinct, except for a "good cause" showing. I know what a "good cause" showing means: No extensions at all.

First of all, let me state that the Backlog Reduction is a worthwhile project, in the abstract. The difficulty with it, as I have seen repeatedly in my thirty-three (33) years of appellate practice, is that when we begin to speak of Backlog Reduction, we immediately start talking about balancing the problems of the Court and the budget of the Court on the backs of its frequent practitioners as a no cost path of least resistance. I have seen this history repeatedly. This appears to be yet another proposal along those same lines.

The real problem is not the delays that the practitioners are bringing to the Court because of the urgent press of business and frivolous delays accomplished by the lawyers. There are three serious problems, two of which are easily fixed, one of which is not.

First of all the Stenographers are notoriously unconcerned with time deadlines, especially since the Court of Appeals no longer chases them but because the Appellate Court now mandates the counsel for the appellants- which have no especial sway with the Court Reporters-- do so. Secondly, the Court Reporters treat a twenty (20) page transcript with the same ninety-one(91) day time comfort zone as they do a two thousand page (2000) complex commercial action record. And that big record very infrequently gets in on time and usually requires Contempt Motions. Really now, is it the lawyers who are the Prima Donnas or the Court Reporters?

Secondly, the Court of Appeals staff does not even begin to assemble the Record until every last Brief is filed, adding six or seven months of completely avoidable time added to the process. There is no good reason for Court staff to wait to pull the transcripts together as soon as Appellant's initial brief is filed as that Record as cited in that Brief is certainly at issue and alerts the Court of Appeals staff to what needs to be preliminarily corralled. The time savings here would be about six months in most cases. That, too, is an easy fix.

The much more difficult-- and expensive-- problem is the "Warehouse" which is **not** the fault of the lawyers but, rather, is the end result of a public funding system which precludes the Michigan Court of Appeals from hiring the requisite number of Pre-Hearing Attorneys and Commissioners to get the necessary jobs timely done. The bottleneck is the Court, or, to be more fairly accurate, the lack of professional staff of the Court because of inadequate funding.

The solution to the ever expanding docket crisis is proper funding of Pre-Hearing Staff and Commissioners. Honestly, the Michigan Court of Appeals Clerk's office does a fantastic job with the limited budget it is afforded. The Pre-Hearing Staff and the Commissioners do miracles with what is available. But what happens is that the system slows down to accommodate the human and comprehensible needs of court officials to do intelligent work in the expanded time available, with insufficient resources. There is the true reason for the elongation of the appellate process; it is not the lawyers' claimed delays.

The radical solution to eliminate perhaps four (4) months of time because of available extensions of time, while cutting down the amount of time for the original briefing period is lashing out at the wrong group. Again, the lawyers are always easily blamed; it is the Legislature which ought to be dealt with.

I wish to give the Court a personal perspective. My law firm only handles only "box cases". Our average trial transcript is at least three (3) weeks long. It is not physically possible for us to review a transcript and get research done in forty-two (42) days, period. It is punitory for the Court of Appeals to expect that to happen. I have a family, professional obligations, civic obligations and do a lot of charitable and pro bono legal work. I am human: I need rest, I want to take two one (1) week vacations every year. Even with expanded Extensions of Time, I am already nearly at the saturation point.

I am, right now, along with my two (2) associates, managing about thirty-five (35) cases, most of them "box cases". The vast majority of them are in the multi-million dollar category. I am an Appellate Specialist. I have two (2) associates, Lincoln G. Herweyer and Norton T. Gappy, who work alongside of me burning the midnight oil virtually every night. We already work roughly seventy (70) hours per week, each. I really resent the claims

that I cannot budget my time properly.

The vast majority of my "box" cases cannot be digested and briefed in forty-two (42) days. For appellate counsel who did not try the case, forty-two (42) days will generally not be sufficient. Our "box cases" can barely be managed now in one hundred and twelve (112) days. Forty-two (42) days will make that squeeze impossible if several "box cases" converge on us at once. This one-size-fits-all-forty-two-(42)-days-trains-will-run-on-time-mentality punishes appellate practitioners who handle dozens of appellate cases all at the same time. The real professionals, those of us handling dozens of cases at once, will be the victims, I predict.

The Ghosts of Christmases Future is very scary. A useful the-trains-will-run-on-time model is the United States Court of Appeals for the Sixth Circuit. Briefing is set in a mandatory fashion for forty-four (44) days, tops, and this becomes such a difficult time compression that I can only take one (1) or two (2) cases in active briefing for the United States Court of Appeals for the Sixth Circuit at a time lest I end up in real professional trouble. That is what is being proposed here: A cauldron of forty-two (42) days, requiring compressed Major Cases which encompass three (3) to six (6) weeks of trial, hundreds of exhibits and a pre-trial record which alone would take forty-two (42) days to wade through into **less** than half the available time now allowed. There is no way for me to keep a proper docket.

The United States Court of Appeals for the District of Columbia is another useful example. There, unalterable Briefing Dates are announced without recognition of missing records, unexpected surgeries, preplanned vacations and other immutable Briefing deadlines from other Courts. Got a problem in the CADC? Tough! You should not have taken the case unless you are a gifted clairvoyant like Jeanne Dixon. Forgive me for wanting to fight aggressively for Michigan's humanism. Been there, done that, in other jurisdictions and I say that justice suffers when a one-size-fits-all-yardstick is the only ruler for Briefing Schedules.

Again, who will be advantaged by a one-size-fits-all forty-two (42) day period for briefing? Having previously been a partner in a 200+ person firm, again, certainly, major law firms and major corporations who have the resources to compress that kind of energy into that short a period of time will be winners. And a lawyer with only one appellate case is also a lucky one.

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But that should never be how the justice system works.

It may come no surprise to the Michigan Supreme Court, but the vast majority of appellate practitioners in this state are in solo practice or, like myself, or have, at the most, one (1) or two (2) partners or associates. The crush of business of having **all** cases compressed into one forty-two (42) day period as a cemented straight-jacket, means that we will be in the Sixth Circuit/District of Columbia pressure cooker constantly, making it impossible to study files leisurely, review transcripts with time for thought, do legal research as befits scholarship and still have what remotely passes for a Life Apart From The Law.

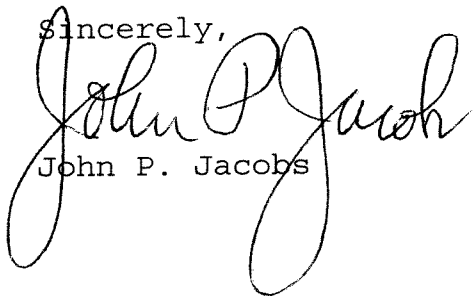
By no means is the system broken. Fixing it by radical surgery is dangerous and unfair to the truly innocent group here, the day-to-day appellate lawyers who are managing litigation at competitive rates, competing with a judicial system that takes no account of the impossible nature of compressing huge cases into very short time spans.

I protest the elimination of the fifty-six (56) day period of time and the additional fifty-six (56) day period of available extensions under MCR 7.212.

It is my belief that the proposal should be rejected and other means of finding adequate funding for the Pre-Hearing Staff and the Michigan Court of Appeals Commissioners be implemented forthwith.

Thank you for your attention to this matter.

Sincerely,



John P. Jacobs

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